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DHARSHAN SINGH ATMA SINGH v. MAJLIS PEGUAM MALAYSIA

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[CIVIL SUIT NO: 25-9-03-2014]
B 10 FEBRUARY 2015

LEGAL PROFESSION: *Professional discipline – Restoration to Roll of Advocates and Solicitors – Applicant struck off the Roll since 2002 – Application for reinstatement – Whether applicant fit and proper person to be reinstated – Whether requirements for reinstatement satisfied – Whether time frame to apply for restoration stipulated in statute – Legal Profession Act 1976, s. 107*

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In 1995, one Mohd Meera ('complainant') lodged a complaint against the applicant advocate and solicitor alleging that the applicant had failed to pay the complainant a sum of RM9,000 being compensation awarded by the court to the complainant. The Disciplinary Committee ('DC') of the respondent found the applicant guilty of breaching s. 94(3) of the Legal Profession Act 1976 ('LPA') and based on its finding, recommended to the respondent's Disciplinary Board ('DB') that the applicant be struck off the Roll of Advocates & Solicitors, High Court of Malaya ('the Roll'). Following his removal from the Roll in 2002 the applicant sought, by way of an originating motion, reinstatement as an advocate and solicitor pursuant to s. 107 of the LPA. The issues that arose for consideration of the court, *inter alia*, were (i) whether the applicant was a fit and proper person to be restored to the Roll; and (ii) whether there was any issue of lapse of time under the LPA for the applicant to make an application for restoration.

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Held (allowing applicant's motion):

(1) The court, pursuant to s. 107(a) of the LPA, has the discretion to restore the name of any advocate and solicitor who had been removed from or struck off the Roll if the courts thinks it is fair and reasonable to do so. There is no time frame stipulated in the LPA for the advocate and solicitor to make an application for restoration to the Roll from the date of the order striking him off the Roll. (para 10)

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(2) The long lapse of time did not operate as a bar to the application and was not an overriding consideration. Disbarment as a result of professional misconduct or a criminal conviction is not intended by the legislation to be permanent. Therefore, the lapse of 12 years before commencement of the application should not be an overriding factor taken against the applicant as detrimental to his restoration so long as the applicant could provide a plausible explanation. (para 11)

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(3) The only issue raised by the respondent was the outstanding sum of RM9,000 due from the applicant. However, the applicant had since made payment of the sum into the court with the consent of the

respondent. Hence, no issue arose as to the applicant not having made restitution. The applicant had also shown himself to be truly remorseful for his past misdeeds and misconduct. (para 12)

(4) From the record of the complaints lodged against the applicant, all the complaints against the applicant had either been dismissed by the respondent or withdrawn by the complainant, save for the complaint for which the order of striking off the Roll was made by the DB. Hence, the other complaints which did not result in the applicant being found guilty of misconduct should not be taken into consideration in determining whether the applicant was a fit and proper person for readmission to the Roll. Any reference to those complaints would be prejudicial to the applicant. Therefore, it was fair and reasonable to restore the name of the applicant to the Roll as an advocate and solicitor. (paras 13-15)

Case(s) referred to:
Chan Chow Wang v. Malaysian Bar [1986] 1 LNS 94 HC ***(refd)***
Re Ram Kishan [1992] SLR 529 ***(refd)***
Teoh Hooi Leong v. Bar Council [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451 SC ***(refd)***
Thavananthan Balasubramaniam v. Majlis Peguam Malaysia [2009] 6 CLJ 217 FC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(3), 107(1), (2)

For the appellant - Parthiban (Noor Liana Hashim with him); M/s Lau Kok Guan, Liana & Kuan
For the respondent - N Kuna Nadesan; M/s Baharudin, Wan & Kuna

Reported by Sandra Gabriel

JUDGMENT

Gunalan Muniandy JC:

[1] This originating motion ('OM') for reinstatement of the applicant as an advocate and solicitor is pursuant to s. 107 of the Legal Profession Act 1976 ('LPA') after removal of his name from the Roll of Advocates & Solicitors, High Court of Malaya in October 2002 ('the Roll').

Background Facts

[2] The applicant was admitted as advocate and solicitor of the High Court of Malaya around the year 1990 and was registered as a member of the Bar Council of Malaysia ('BC') bearing membership registration number BC/D/056. Thereafter, the applicant began legal practice as a legal assistant in a firm in Penang and several other legal firms until early or the middle of 1993 when he opened his own solicitor's firm in the name and style of Dharshan Singh Nanua and Associates in Parit Buntar, Perak until sometime in the year 2000. His firm of solicitors eventually ceased operations in late 1999 of which the BC was officially notified.

[3] In early 2001 the applicant applied for the annual and practicing certificates from the BC following which he was issued an annual certificate by the BC. He then practised in a couple of legal firms in Johor Bahru until mid - 2001. From July 2001 - mid 2002 he had a stint in the Republic of Palau, Micronesia, working as a legal assistant at a firm of solicitors.

[4] In 1995, one MKK Mohd Meera b. Kader Mydin (hereinafter referred to as 'the complainant') lodged a complaint against the applicant. The complainant alleged that the applicant had failed to pay him the sum of RM9,000 being compensation awarded by the court which was paid *vide* MBB cheque. The Disciplinary Committee established under the LPA found the applicant guilty of having breached s. 94(3) of the LPA. Upon this finding it recommended that the applicant be struck off the Roll. Based on this recommendation, the Disciplinary Board ('DB'), made the order to strike off the name of the applicant from the Roll.

The Applicable Law

[5] Restoration of the name of an advocate and solicitor to the Roll, who has been removed from, or struck off the Roll is governed by the provisions of s. 107 of the LPA of which sub-ss. (1), (2) reads as follows:

> (1) The High Court may, if it thinks fair and reasonable, at any time order the Registrar to restore to the Roll the name of and advocate and solicitor which has been removed from, or struck off, the Roll.
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> (2) Any application that the name of an advocate and solicitor be restored to the Roll shall be by originating motion supported by affidavit, before the High Court.

[6] Wide discretionary powers is, thus, vested in the High Court to make the order of restoration subject to the qualification that it is fair and reasonable to do so, which is the paramount consideration in the exercise of the court's discretion. In *Thavananthan Balasubramaniam v. Majlis Peguam Malaysia* [2009] 6 CLJ 217; [2010] 3 MLJ 316 expounded the principle applicable to s. 107 of the LPA in these terms:

> It is clear and settled that the test under s. 107 of the LPA is whether in the circumstances of the case it is fair and reasonable that the applicant be restored to the Roll of Advocate and Solicitor of the High Court of Malaya. On this point in the case of *Teoh Hooi Leong v. Bar Council Malaysia* [1991] 2 MLJ 190, the Supreme Court in its judgment, *inter alia*, had stated that the word 'fair' must necessarily mean that the decision must be fair to the members of the public, to the court and last but not least to the advocate and solicitor concerned. To be reasonable the Supreme Court went on to state that the decision must be based on reasonable grounds and be supported by cogent evidence and not one based on conjecture or speculation.
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> It is also to be noted that under s. 107 of the LPA there is no stipulation as to the period of time that must elapse between the date of the order striking the solicitor off the Roll and the date of his application for

replacement on the Roll. Be that as it may, it is nevertheless clear that the Legislature has conferred on the court the discretionary power to order restoration it deems fair and reasonable and this discretionary power must be exercised judiciously.

[7] In a leading case, *Teoh Hooi Leong v. Bar Council* [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451; [1991] 2 MLJ 190 the Supreme Court had occasion to enunciate the considerations and principles that should govern the exercise of the High Court's discretionary powers in dealing with an application under s. 107 of the LPA as follows:

(1) Under s. 107(1) of the Legal Profession Act 1976, the High Court may, if it thinks it fair and reasonable, order the registrar to restore the name of any advocate and solicitor which has been removed or struck off the roll. The word fair must necessarily mean that the decision must be fair to members of the public, to the court and last but not least to the advocate and solicitor concerned. To be reasonable the decision must be based on reasonable grounds and be supported by cogent evidence and not one based on conjecture or speculation.

(2) A conviction should not be regarded in every case as a permanent unfitness. Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his named restored to the roll. The lapse of time since the conviction is thus a material consideration. It is true that there should be strong disinclination to re-admit to the profession an advocate and solicitor who had been guilty of improper conduct. The principle that once a solicitor has been struck off the roll for dishonesty he cannot be restored unless there are exceptional circumstances should no longer apply in absolute terms. If an advocate and solicitor lives a blameless life and there is evidence that he has rehabilitated himself generally and there are members of the profession who can vouch to this change, that may overcome the initial misconduct.

(3) The duty of the court in a case like this is to exercise its discretion having regard to the materials available before it and the particular facts of the case. The question should be seen as an exercise of discretion according to particular facts of the case. It should never be regarded as a principle laid down as a rule of law that an advocate and solicitor who has been struck off the roll for dishonesty can never be reinstated.

[8] In an oft quoted case on this aspect of the law, *Chan Chow Wang v. Malaysian Bar* [1986] 1 LNS 94; [1986] 2 MLJ 159, Harun J (as His Lordship then was) formulated the test for re-admission of an applicant to the Bar to be this:

In re-admitting applicants to the Bar, the Court has a duty to litigants and to the legal profession to ensure that such persons are of the highest integrity and honour. The Court must also be satisfied, in the public

A interest, that the Applicant is not likely to repeat these offences if he is re-admitted. The onus is therefore on the Applicant to show that:

(a) there has been such a change in his character as to make him a fit and proper person to resume practice at the Bar;

(b) he is truly penitent; and

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(c) he made restitution.

[9] It is also crucial to note that in exercising the court's judicial discretion whether or not to allow readmission of an applicant, the fundamental consideration is the court's primary duty to protect the interests of the public C and the legal profession as a whole over and above the interests of the applicant to earn a living in his chosen profession. The onus would be on him to satisfy the court that he still possesses the vital qualities of honour and integrity on which the public could safely place their reliance (see Singapore High Court in *Re Ram Kishan* [1992] SLR 529).

D **Findings**

[10] The provisions of s. 107 of the LPA, which are operative in this case are explicitly clear that the discretion lies with the court to restore the name of any advocate and solicitor to the Roll who has been removed from or struck off the Roll if the court thinks that it is fair and reasonable to do so. E Hence, it is an exercise of the court's discretionary powers which has to be done judicially, on correct principles and on valid factual considerations.

[11] It is to be noted that there is no time-frame stipulated anywhere in the LPA for the advocate and solicitor to make the application for restoration to the Roll from the date of the order striking him off the Roll. The long lapse F of time from that date does not, thus, operate as a Bar to the application and is not an overriding consideration. The paramount consideration in the exercise of the court's discretionary powers is whether the applicant has been shown to be a fit and proper person to be allowed to resume practice at the Bar. Disbarment as a result of professional misconduct or a criminal G conviction is not intended by the Legislature to be permanent as amply apparent from the provisions of s. 107 of the LPA. If the circumstances disclose that it is fair and reasonable for the applicant who has reformed to be restored to the Roll, the court in its discretion is vested with the powers to grant the order of restoration. A lapse of 12 years in this case before H commencement of this action should not be an overriding factor taken against the applicant as detrimental to his restoration so long as he can provide a plausible explanation which he appears to have done in this case.

[12] Whether the applicant has made restitution is a relevant factor that merits serious consideration. In this respect the only issue raised by the I respondent (BC) is the outstanding sum of RM9,000 due from the applicant as at the commencement of this proceedings. He has since made payment of the sum into court with the consent of the BC. Hence, no issue arises as to the applicant not having made restitution.

[13] As for remorsefulness or penitence, this can be clearly inferred from the circumstances, specifically the averments deposed to by the applicant in both his affidavits. It is a state of mind for which no direct evidence would be necessary. In any event, there is no serious dispute by the respondent that the applicant has shown himself to be truly remorseful for his past misdeeds and misconduct that resulted in the said disciplinary action that led to him being struck off the Roll. The long lapse from the date of the order and the blameless life that he led since then till now is also evidence of being rehabilitated which the BC, has not contradicted. In fact, the report of the BC itself attests to this fact. There has been no attempt by the BC to rebut or contradict the applicant's evidence that he had over the years since being removed sufficiently rehabilitated himself.

[14] Coming now to the opposition of the BC to this motion, it is in essence that applicant had been dishonest in the course of his professional practice, as evident from the long list of complaints made by his clients to the BC prior to his disbarment, out of which eight had been dismissed by the Board. From the record of the complaints lodged against him and the outcome as set out in the s. 107 report of the BC, it would appear that all the complaints had either been dismissed by the DB or withdrawn by the complainant, save for the complaint for which the order of striking off the Roll was made by the DB. Hence, the other complaints which did not result in him being found guilty of misconduct should not be taken into consideration in determining whether he is currently a fit and proper person for readmission to the Roll. Any reference to these complaints would thus be prejudicial to the case of the applicant on the ground of irrelevancy to the issue at hand.

[15] For the above reasons, primarily, in my finding, based on the undisputed or admitted facts, the evidence presented and the material before the court, the applicant has satisfied the test enunciated in *Chan Chow Wang v. Malaysian Bar* [1986] 1 LNS 94; [1986] 2 MLJ 159 and discharged the onus to establish the three elements as required under the test for the order of restoration to be made. I, therefore, hold that it is fair and reasonable under the facts and circumstances of this case as adverted to for the court to restore to the Roll the name of applicant as an advocate and solicitor. I would accordingly, allow this motion.